CHIP YEW BRICK WORKS SDN. BHD.

v.

CHANG HEER ENTERPRISE SDN. BHD.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
MOHD. AZMI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 267 OF 1987]
25 MAY 1988

COMPANY LAW: *Notice under s. 218 of Companies Act 1965 - Failure to pay - Injunction restraining from advertising petition - Section 218(2)(a) of Companies Act 1965 - Whether bona fide dispute.*

Appellant served on the respondent company a notice under s. 218 of the Companies Act 1965. Upon the respondent company failing to pay the amount claimed, the appellant filed a petition for the winding up. The respondent company obtained an injunction restraining the appellant from advertising the petition.

The learned Judge stated in his grounds for granting the injunction that the respondent company responded to the statutory notice and disputed the claim and therefore there was a *bona fide* dispute. As such the respondent company was not caught under s. 218(1)(e) and 218(2)(a) of the Act. The appellant appealed against the grant of the injunction.

Held:

[1] In its application for injunction the respondent company admitted that it owed the appellant a substantial sum of the amount claimed and therefore the respondent company is caught under s. 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt.

[2] Therefore the appellant should not be prevented from pursuing its petition so that the Court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it.

[Injunction set aside.]

Cases referred to:
In re A Company [1894] 2 Ch 349
Re Welsh Brick Industries Ltd. [1946] 2 All ER 197

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (2)(a)

JUDGMENT

Wan Hamzah J:

The appellant served on the respondent company a notice under the Companies Act 1965 (the Act) demanding payment of a sum of RM127,159 and notifying that action for the winding-up of the respondent company would be taken in the event that payment is not made within the stated time. The sum was the cost of bricks supplied. The respondent company did not pay any part of the amount claimed. Eventually the appellant filed a petition for the winding-up. But on the application of the respondent company the High Court granted an injunction restraining the appellant from advertising the petition. This appeal is brought

against the grant of the injunction.

The learned High Court Judge stated his grounds for granting the injunction as follows:

> The letter "J" dated 30 September 1986 (of the respondent company) in response to the statutory notice disputed the petitioner's claim of RM127,159 as being the outstanding balance of the purchase price of bricks sold and delivered and requested for full particulars. There was no response to all these letters, by the petitioner. In the light of these letters and the absence of any response on the part of the petitioner, I agreed that there was a *bona fide* dispute of the exact amount owing and that the respondent had not neglected the statutory notice of demand ...

Therefore the learned Judged held that the respondent company was not caught under ss. 218(1)(e) and 218(2)(a) of the Act, which reads as follows:

> 218(1) The Court may order the winding if:
>
> (e) the company is unable to pay its debts;
>
> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred dollars then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

The learned Judge agreed with the respondent company that advertising the petition would cause irreparable damage to it as an ongoing concern.

Although in the letter "J" referred to by the learned Judge the respondent company disputed the appellant's claim for RM127,159, in its affidavits in support of its application for injunction the respondent company admitted that it owed the appellant a sum of RM60,580 and stated that it was at all times ready and willing to pay this sum. In our judgment, as the debt of RM60,580 is not disputed the respondent company is caught under s. 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the Court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not to order it. If an order of winding-up is made the respondent company can still defend on the balance amount in dispute. Under the Act the liquidator may defend any action or other legal proceedings in the name and on behalf of the company which has been ordered to be wound up. The Act also provides for the fixing of dates on which creditors are to prove their debts or claims against the company. Even where the whole amount of debt claimed is disputed the Court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the Court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd.* [1946] 2 All ER 197.

For the respondent company the case of *In re A company* [1894] 2 Ch 349 was cited to us. In that case it was held that where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the Court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition,

and staying all proceedings upon it. It was contended that the purpose of the appellant in bringing the present petition was to put pressure on the respondent company and hereby to induce it to pay a sum which is not due and owing, and to cause irreparable damage to the respondent company by advertisement of the petition. We find that the evidence so far placed before the Court does not establish this.

The only other ground of the respondent company to support its application for injunction is to be found in its effort to show that it is solvent. It produced the balance sheet, the trading, contract, profit and loss account, a list of debtors and the amounts of their debts, and a list of creditors and the amounts due from them. All of these documents show the positions as at 30 November 1986, and on the basis of these documents it was contended that the balance after the amount of debts owing to the respondent company is reduced by the debts owed by it was RM451,690.15 in favour of the respondent company. In our judgment this matter, if relevant at all, is a matter properly to be considered at the hearing of the petition, and it is premature to consider it at this stage. The Companies (Winding-Up) Rules require that every petition shall be advertised, and in our opinion it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding-up. If the advertisement would in fact cause such damage, this is not a ground to prevent a *bona fide* petitioner from advertising.

We order that the injunction be set aside. The appeal is allowed with costs here and in the High Court. The deposit should be refunded to the appellant.

Also found at [1988] 2 CLJ 424